

CORONAVIRUS PANDEMIC

Courts adopt virtual, remote proceedings

Changes forced on legal system may mean lasting improvements

By Bob Eggle

Jurors can't sit alongside one another. Defendants can't confront their accusers in person. Judges, lawyers, clients and witnesses communicate electronically from a distance.

Such is the new reality at courts across California, where the coronavirus pandemic, and its accompanying social distancing mandates, have forced the legal system to innovate and experiment with virtual and remote proceedings to keep cases moving forward. In certain cases, judges and lawyers conduct arraignments, depositions, guilty pleas and even sentencing using video and telephone conferencing.

That's a significant change for the legal system, where long-established constitutional rights entitle defendants to be charged, tried and judged by people they can look in the eye. Those rights are now being weighed against the dire health consequences resulting from human proximity during this pandemic.

Criminal trials are on hold in California state courts, and it's far from certain when they will resume or what form they will take. But courts are looking for pretrial proceedings that can be conducted remotely — arraignments where charges are announced, plea negotiations, input from crime victims, and with the defendant's consent, pleas and sentences that resolve the case.

Some veterans of the system, and legal analysts, say the adaptations offer a lesson for the post-virus future.

"This pandemic will open everyone's mind, and gets people to move out of their silos," said Alice Armitage, a law professor at UC Hastings in San Francisco, who established the school's legal technology program. "Maybe having to live this way will make us think more broadly and break down barriers."

Or as well-known defense attorney J. Tony Serra sees it, after more than a half century of law practice with such clients as Huey Newton, Raymond "Shrimp Boy" Chow and members of the Symbionese Liberation Army: "I have no fear that change will occur. It feels radical, challenging." The Constitution, which defines the rights of criminal defendants and others in the legal system, is "brilliantly elastic," he said.

Which is not to say that today's emergency measures will be extended, or advocated, after the coronavirus crisis ends. Jury trials in California, now frozen for 60 days by order of Chief Justice Tani Cantil-Sakauye, will return at some point, accompanied by a full basket of constitutional rights. Criminal defendants will once again appear in court to enter pleas, take part in hearings and trials, and face sentencing when convicted. Sponsors will return to courtroom galleries.

There's more behind these practices than simply tradition.

"As remote communication tools improve ... we could see virtual proceedings become more commonplace. Now, though, they're the second-best option," said Eliot Williams, a Palo Alto attorney and co-author of a recent article for Law360 on how to conduct sworn depositions online. In-person hearings, he said, enable lawyers "to better read the judge's facial expression, body language — and there are few audio problems."

During an in-person jury trial, "a cross-section of our society meets together and acts as a community," said James Bostwick, a Mill Valley attorney specializing in medical malpractice cases and former president of the International Academy of Trial Lawyers. "They have a remarkable opportunity to evaluate other human beings in the flesh — parties, experts and witnesses, all under the watchful eye of a robed judge and subject to close examination."

"This is where the truth becomes evident — where people reveal their souls — up close and personal," Bostwick said. If jurors and other trial participants can communicate only from "safe zones," he said, "the administration of justice will have become remote, more akin to a Hollywood production."

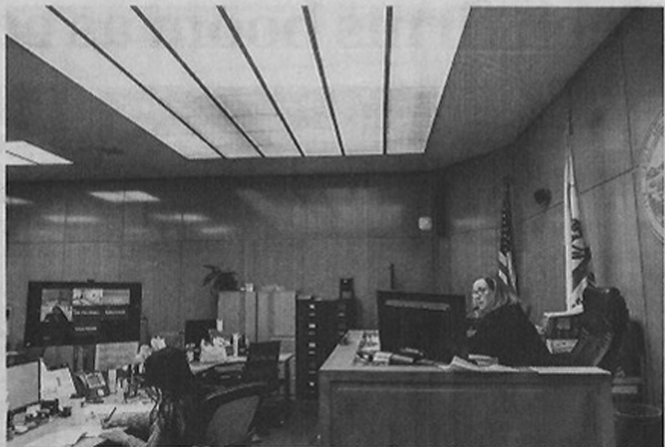
Not everyone sees it that way.

"Physical confrontation in the courtroom isn't always the best way to make defendants feel like they've been treated with dignity," said Andrea Roth, a criminal law professor at UC Berkeley and a former public defender. And sometimes the same holds true for witnesses, she said, noting the Supreme Court's 1990 ruling in Maryland vs. Craig.

In the trial of a day care worker accused of molesting a preschool child, a judge allowed the child, and other children, to testify by closed-circuit television to avoid the trauma of having to look at the defendant. In a 5-4 ruling upholding the worker's conviction, Justice Sandra Day O'Connor said the constitutional right to confront one's accuser in court could be overridden when necessary to achieve an important public policy, such as accurate testimony and prevention of trauma.

In dissent, conservative Justice Antonin Scalia, joined by the court's liberal members, said, "Virtual confrontation might be sufficient to protect virtual rights. I doubt whether it is sufficient to protect real ones." The majority ruling remains binding, and Roth said courts in most states, including California, have applied it to allow remote testimony based on a showing of necessity.

Courts must also find that a dire necessity justifies remote testimony. An issue that arose last month in New York. During a criminal trial in federal court, a juror became ill during deliberations and asked



San Francisco County Superior Court Judge Loretta Giorgi presides over cases while other officers of the court contribute remotely. The pandemic is transforming the justice system.



Giorgi is reflected in the video screen while presiding over court cases as other officers of the court contribute remotely.

Virtual courtroom

Because of the necessity of social distancing during the coronavirus pandemic, court systems are conducting a variety of remote and virtual proceedings, using video and telephone technology, including:

- ▶ Arraignments, where criminal charges are announced and a defendant decides whether to plead guilty.
- ▶ Depositions, sworn pretrial testimony by witnesses outside the courtroom.
- ▶ Settlement conferences in civil cases, and plea negotiations in criminal cases.
- ▶ Victim impact statements, required by California law before a defendant is sentenced.
- ▶ Guilty pleas and sentencing, with the defendant's consent.

Source: Chronicle research

to participate from home. The judge agreed despite objections from the prosecutor — the decision would have been more difficult, Roth said, if the defense had challenged it — and the juror joined a unanimous guilty verdict later that day.

In San Francisco, U.S. District Judge Vince Chhabria, who had stopped holding sentencing hearings in his court to protect participants' health, faced a March 23 sentencing hearing for a drug defendant who was being held in Santa Rita Jail. Because the inmate was seeking a sentence equal to the time he had already served, postponement would have prolonged his confinement in a crowded jail that has released hundreds of prisoners for safety reasons in the past month.

So Chhabria found a federal rule that could be interpreted as allowing remote sentencing with the defendant's consent, got a waiver from the inmate through his lawyer, and then

held a telephonic hearing with both lawyers and sentenced the man to no further confinement. The \$2.2 trillion fiscal stimulus bill that President Trump signed March 27 includes a provision expressly allowing sentencing hearings by telephone or video.

Remote proceedings are also expanding in the state court system, where most criminal cases originate.

Even before the virus struck, "we were already filing all cases electronically" rather than on paper, said James Gibbons-Shapiro, an assistant district attorney in Santa Clara County. He said county courts have allowed witnesses at hearings to testify by video, when necessary, for the past several years. In arraignments, negotiations and guilty pleas, he said, recently installed equipment allows an inmate to go off camera into another room to speak privately and remotely with the defense lawyer, then return for proceedings in the virtual courtroom.

In San Francisco, "we're ahead of the game," said Assistant District Attorney Alex Bastian, spokesman for District Attorney Chesa Boudin. He said most pretrial proceedings are being conducted electronically, with cooperation from judges, law enforcement, defense lawyers and victims' advocates, and the changes "will benefit all of us for many years to come."

San Francisco Public Defender Mano Raju is more skeptical.

"I am very concerned about the possibility of too much happening remotely," he said in an interview, maintaining that critical errors — faulty identification by an eyewitness, for example — were more likely when witness and suspect are in different locations. While defendants can agree to

be arraigned or plead guilty without appearing in court, Raju said, "my preference is that courts figure out ways to ensure social distancing so that proceedings can occur in person."

Still, said Drew Amerson, who teaches law at UC Hastings and directs its LexLab legal technology hub, the coronavirus appears to be "a catalyst for changes that were hopefully coming anyway."

In disputes before the U.S. Patent Trial and Appeal Board, he said, "you can go into a hearing room in San Jose with a patent judge in Virginia. I don't see why it can't be done more broadly in state courts."

Physical presence is preferable during deposition of a witness, Amerson said, because "there's a lot you can pick up on in person that you can't do by video. But you can't let the perfect be the enemy of the good."

Armitage, his Hastings colleague, said technology can make legal rights more accessible for many Americans.

"Much of our system is kind of old-fashioned and requires human contact, and access to lawyers that many can't afford," Armitage said. At least in some cases, she said, everyday people would be more likely to take part in legal proceedings, and thus protect their rights, if they could do so remotely rather than going to court.

Serra, 85, said he grew up when people were writing letters to each other and lawyers did their research in law libraries, which now have virtually disappeared. He said the future of the law is electronic.

Allowing juries to watch proceedings remotely would mean that "jurors are not influenced by the judge, or the D.A., but by your peers," Serra said. He said they can get better looks at witnesses, and judge their credibility, through video close-ups — just like baseball fans have a closer view of the pitcher on television than they do from the bleachers.

"The basic principles will still be embedded — (proof of guilt) beyond a reasonable doubt, the right to confront witnesses ... and cross-examine them more effectively," Serra said. "It may take 50 years to online jury trials, but we're in the transitional phase."

"It's been started by this plague. But it's a good thing."

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